



1995 ASSEMBLY BILL 1088

March 27, 1996 - Introduced by Representatives GREEN, DUFF, FREESE, OTT, JENSEN, KREIBICH, MUSSER and PORTER, cosponsored by Senators WELCH and HUELSMAN. Referred to Committee on Judiciary.

- 1 **AN ACT** *to create* 144.994 and 905.20 of the statutes; **relating to:** creating a
2 privilege for environmental audits, providing immunity for disclosures related
3 to environmental audits and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill creates an immunity from the imposition of a civil or criminal penalty in cases involving potential violations of an environmental requirement. The immunity applies if a person voluntarily discloses the information related to the potential violation promptly after the person knew of the potential violation, based on information obtained in an environmental audit. In addition, the immunity applies only if the person makes a good faith effort to correct the potential violation and cooperates with the department of natural resources (DNR) in any investigation related to the disclosure. The immunity does not apply in certain situations, including when the information is required to be disclosed under a permit or order issued by DNR.

The bill also establishes an environmental audit privilege, restricting the disclosure of any information obtained as part of an environmental evaluation of a site or facility. The privilege applies to audits that are conducted at the request of the owner or operator of the site or facility and that are not required under a permit or order issued by DNR. The bill provides that the privilege is not waived by disclosure of the contents of an environmental audit to certain groups, including directors and shareholders of the business entity that owns or operates the site or facility, state or federal officials under the terms of a specific agreement or DNR if the audit was voluntarily disclosed and conditions are met to provide immunity from penalties. Under the bill, a court may determine that the privilege does not apply if the privilege is asserted for fraudulent purposes, if timely action is not taken to respond to any environmental noncompliance found in the audit or if the owner or

operator of a site or facility knew of an environmental violation disclosed during the audit.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 144.994 of the statutes is created to read:

2 **144.994 Immunity for disclosures. (1) DEFINITIONS.** In this section:

3 (a) “Environmental audit” has the meaning given in s. 905.20 (1) (a).

4 (b) “Environmental requirement” has the meaning given in s. 905.20 (1) (b).

5 **(2) DISCLOSURE IMMUNITY.** (a) A person who voluntarily discloses information
6 relating to a potential violation of an environmental requirement to the department
7 shall be immune from the imposition of a civil or criminal penalty which may be
8 imposed for the violation if all of the following apply:

9 1. The disclosure is made promptly after the person knew, on the basis of
10 information obtained during an environmental audit, that a potential violation
11 occurred.

12 2. The person makes a good faith effort to timely correct the potential violation.

13 3. The person cooperates with any reasonable request by the department in any
14 investigation that results from the disclosure.

15 (b) If the person who voluntarily discloses information under par. (a) is a
16 governmental unit, as defined in s. 939.648 (1), or a business entity, the immunity
17 under this subsection applies to a director, officer, official, shareholder, trustee and
18 managing employe, as defined in s. 49.498 (1) (e), of that person and to an employe
19 of that person if the employe consents in writing to the disclosure.

20 **(3) EXCEPTIONS.** A penalty may be imposed notwithstanding sub. (2) if any of
21 the following applies:

1 (a) The information disclosed under sub. (2) is required to be reported under
2 a specific permit condition or under an order issued by the department.

3 (b) Within 3 years before the disclosure, a court decided that the person making
4 the disclosure committed a pattern of continuous, repeated violations of
5 environmental requirements in separate and distinct events related to a site or
6 facility that resulted in significant harm to public health or the environment.

7 (c) Within 3 years before the disclosure, the person making the disclosure has
8 been subject to multiple settlement agreements related to substantially the same
9 alleged violations as disclosed under sub. (2) and those violations resulted in
10 significant harm to public health or the environment.

11 (d) The violation was committed with knowledge by an owner or operator of a
12 site or facility that an environmental requirement was violated.

13 **(4) BURDEN OF PROOF.** When the department commences an enforcement action
14 against any person covered under sub. (2) for a violation of an environmental
15 requirement based in whole or in part on information contained in an environmental
16 audit and disclosed to the department, the disclosure shall be presumed to be
17 voluntary. The department has the burden of proving by a preponderance of the
18 evidence that a penalty may be imposed because the disclosure was not voluntary,
19 because any of the conditions under sub. (2) (a) 1. to 3. were not met or because one
20 of the exceptions under sub. (3) applies.

21 **SECTION 2.** 905.20 of the statutes is created to read:

22 **905.20 Environmental audit privilege. (1) DEFINITION.** In this section:

23 (a) "Environmental audit" means an evaluation of a site facility or of an activity
24 or management system related to a site or facility, if the evaluation meets all of the
25 following criteria:

1 1. Is conducted by or at the request of the owner or operator of the site.

2 2. Is not required under a specific permit condition or under an order issued by
3 the department.

4 3. Is undertaken for the purpose of identifying, documenting and improving
5 compliance with environmental requirements.

6 (b) “Environmental requirement” means a federal, state or local environmental
7 law, including any rule, regulation, ordinance, permit or special order issued under
8 those laws. State environmental laws include chs. 144, 147, 159, 160 and 162 and
9 ss. 146.20 and 166.20.

10 **(2) GENERAL RULE OF PRIVILEGE.** An owner or operator of a site or facility has
11 a privilege to refuse to disclose and to prevent any other person from disclosing any
12 document or record, stored in any format, that is collected or developed for the
13 primary purpose and in the course of, or as a result of, an environmental audit of the
14 owner’s or operator’s site or facility. This privilege may be claimed in any civil or
15 criminal action or administrative proceeding, including a contested case, as defined
16 in s. 227.01 (3). Disclosure of any part of an environmental audit to any of the
17 following does not waive the privilege under this section:

18 (a) An employe, agent, successor, assignee, director or shareholder of the owner
19 or operator of the site or facility.

20 (b) An attorney of the owner or operator of the site or facility.

21 (c) An independent contractor retained by the owner or operator of the site or
22 facility to review an issue raised as a result of the environmental audit.

23 (d) A partner or lender of the owner or operator of the site or facility or a person
24 whom the owner or operator is currently negotiating with regarding partnership,
25 transfer of ownership or lending of money.

1 (e) A state or federal official or employe under the terms of an agreement
2 between a state or federal agency and the owner or operator of the site or facility.

3 (f) The department of natural resources if the disclosure meets the conditions
4 under s. 144.994 (2) (a).

5 **(3) WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the owner
6 or operator of the site or facility. If the owner or operator of the site or facility is a
7 governmental unit, as defined in s. 939.648 (1), or a business entity, the privilege may
8 be claimed by a director, officer, official, shareholder, trustee and managing employe,
9 as defined in s. 49.498 (1) (e), or by any other employe who consented in writing to
10 the preparation of the environmental audit. The authority to claim the privilege
11 under this subsection is presumed without evidence to the contrary.

12 **(4) EXCEPTIONS.** (a) The privilege does not apply if a court of record, after an
13 in camera review of the environmental audit, including a statement listing any
14 activities undertaken as a result of the audit to achieve compliance with
15 environmental requirements, determines that the person seeking access to the
16 document or record related to an environmental audit proves by a preponderance of
17 the evidence any of the following:

18 1. That the privilege is asserted for a fraudulent purpose.

19 2. That the owner or operator of the site or facility failed to take the appropriate
20 responses necessary to achieve compliance within a reasonable time after any
21 noncompliance was discovered as the result of an environmental audit.

22 3. That the environmental audit provides information about a site or facility
23 that constitutes a violation of an environmental requirement and that the violation
24 was committed with knowledge by an owner or operator of the site or facility that the
25 site or facility violated an environmental requirement.

1 (b) The privilege does not apply if the state has reasonable cause to believe that
2 the owner or operator has committed a criminal offense related to the site or facility
3 in violation of environmental requirements, based on information independent of the
4 environmental audit, and one of the following procedures is followed:

5 1. The state, pursuant to a search warrant, subpoena or discovery in a criminal
6 action, asks a court of record to take possession of a document or record related to an
7 environmental audit and the person entitled to claim the privilege fails to petition
8 the court of record within 60 days after the court takes possession to prevent the state
9 from obtaining the document or record.

10 2. The state, pursuant to a search warrant, subpoena or discovery in a criminal
11 action, asks a court of record to take possession of a document or record related to an
12 environmental audit and the person entitled to claim the privilege petitions the court
13 of record within 60 days after the court takes possession to prevent the state from
14 obtaining the document or record. The petition shall include the date on which the
15 environmental audit was completed, the name of the person who conducted the audit
16 and a statement listing any activities undertaken as a result of the audit to achieve
17 compliance with state or federal environmental requirements. Within 45 days after
18 the filing of the petition, the court shall schedule a hearing regarding the petition.
19 After the hearing and an in camera review of the documents submitted to the court
20 regarding the audit, the court determines that there is probable cause to believe that
21 the owner or operator of the site or facility has committed a criminal offense in
22 violation of environmental requirements and has failed to take appropriate, prompt
23 action to eliminate the violation and prevent future violations.

24 (c) The privilege does not apply to any of the following:

